UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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DAVID NORKIN,

Plaintiff,

-against- Case No. 05 CV 9137 (DC)

DLA PIPER RUDNICK GRAY CARY, LLP,

Defendant.

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PLAINTIFF'S MEMORANDUM IN
SUPPORT OF MOTION FOR REMAND

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This memorandum is submitted in support of the motion by plaintiff David Norkin pursuant to 28 U.S.C. §1434(c) and §1452(b) to remand this action to the Supreme Court New York County, where it originated. This malpractice action was removed solely on the purported ground that it "arises in and is related to plaintiff David Norkin's Chapter 7 bankruptcy case...and the Chapter 11 bankruptcy case of Britestarr Homes, Inc..." Subject matter jurisdiction is premised solely on 28 U.S.C. §1334.

As shown below, this case did not "arise in" the bankruptcy proceeding, and, accordingly, the Court is required to abstain from hearing the case and must remand it to the state court [28 U.S.C. §1334(c)(2)]. Even if the Court determines that abstention is not mandatory, the Court should exercise its discretion and abstain from asserting jurisdiction and remand to state court pursuant to 28 U.S.C. §§1452(b).

Background

This is an action for malpractice brought under New York state law. A copy of the Complaint is annexed as Exhibit A to the attached declaration of Richard M. Asche, dated November 23, 2005. The plaintiff David Norkin ("Norkin") alleges that defendant, a large national law firm, gave him improper advice and violated state conflict of interest rules during the course of its representation of him.

As alleged in the Complaint, Mr. Norkin was the President and a salaried employee of Britestarr Homes, Inc. ("Britestarr")(Complaint, ¶1), a company which intended to develop land in Bronx, New York as a power plant (¶3). Norkin and Britestarr retained defendant in 1999 to represent it in connection with its development efforts (¶8). During the course of the representation, defendant also rendered legal advice to Norkin individually (¶18).

Britestarr entered into an agreement with ABB Equity Ventures ("ABB"), a potential purchaser of the Bronx property, giving the purchaser the option to purchase the land for a minimum of $31.4 million (¶7). While the option was still in effect, Britestarr encountered financial difficulties (¶15). Moreover, a dispute arose between Britestarr and Norkin and ABB, resulting in litigation (¶15).

While the litigation was pending, ABB conveyed to defendant law firm an offer to settle the litigation and extend the option period for an additional consideration of $1 million, enough money to keep Britestarr in business (¶17). Defendant failed to tell Norkin and Britestarr about this offer, but instead advised Britestarr to file a bankruptcy petition (¶18). Of importance to this case, the defendant also erroneously advised Norkin personally to resign as President of Britestarr, thereby forfeiting substantial salary and other benefits [¶23 and 33(a)]. It is alleged that defendant's advice to Norkin was improper and constituted malpractice (Id).

Moreover, unbeknownst to Norkin and Britestarr, defendant was simultaneously representing the owner of a TransGas power plant project in Brooklyn, New York. This project would compete directly with the project to be built on Britestarr's property. Defendant stood to receive a much larger fee as project counsel for the TransGas project than the defendant would receive as counsel for Britestarr and Norkin. Defendant never disclosed its conflict of interest to plaintiff [¶¶24-26, 29(a)].

Plaintiff seeks damages solely in his own name from defendant, independent of any damages suffered by Britestarr. Specifically, plaintiff seeks compensation for lost salary and other benefits caused by defendant's erroneous (and conflictdriven) advise to resign as President of Britestarr. (Complaint, ¶¶30 and 34, and first "Wherefore" clause).

The Bankruptcy Cases

In January 1997, two and a half years before Britestarr or Norkin hired defendant, and five years before the events giving rise to this action, plaintiff filed a voluntary petition under Chapter 7 of the Bankruptcy Code in the Bankruptcy Court for the District of Connecticut. As shown below, the damages sought by plaintiff -- lost salary and benefits accruing post-bankruptcy -- are not assets of the bankruptcy estate. Plaintiff cannot recover – and is not seeking -- any damages as a result of damages sustained by Britestarr on the loss by plaintiff of his Britestarr stock.

As set forth in the accompanying declaration of Richard M. Asche, prior to commencement of the action, plaintiff's counsel discussed the potential claims with Mr. Norkin's trustee, who declined to bring them in the name of the estate, possibly because he believed that they did not belong to the estate or because he did not wish to incur the expense of bringing the claims. The Trustee and plaintiff entered into an understanding -- not yet reduced to writing or approved by the Court -- that the Trustee would receive a portion of any proceeds obtained by plaintiff in exchange for a release of possible claims by the estate against Mr. Norkin.

Britestarr is also in bankruptcy, having filed its petition in 2002. None of the claims asserted in the Complaint belong to Britestarr.

Removal to this Court

On October 26, 2005, the defendant removed this action to this Court, purportedly on the sole ground that this case "arises in or is related to" Mr. Norkin's 1997 bankruptcy case and Britestarr's bankruptcy case. See, Exhibit B to the Asche Declaration.

Argument

I.

THE COURT MUST ABSTAIN AND REMAND THIS CASE TO

THE STATE COURT PURSUANT TO 28 U.S.C. §1334(c)(2)

Assuming that this Court has subject matter jurisdiction over plaintiff's claims by reason of his agreement to share the proceeds with the bankruptcy estate, the Court must nonetheless remand the case to state court if it falls within the category of cases described in 28 §1334(c)(2), which provides:

> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction [Emphasis added].

§1334(c)(2) applies to cases removed from state court. Mt. McKinley Insurance Company v. Corning Incorporated, 399 F.3d 436 (2nd Cir. 2005).

In Channel Bell Associates v. W. R. Grace & Co., 1992 U.S. Dist. LEXIS 13014 (S.D.N.Y. 1992), the Court enumerated the prerequisites for mandatory abstention as follows:

> Under the terms of §1334(c)(2), in order for mandatory abstention to apply to this action, (1) plaintiffs must "timely" have brought their cross-motion for abstention; (2) the action must be based upon a state law claim; (3) the action must be "related to" a bankruptcy proceeding, as opposed to "arising under" the Bankruptcy Code or "arising in" a case under the Bankruptcy Code; (4) the sole federal jurisdictional basis for the action must be §1334; (5) there must be an action "commenced" in state court; and (6) the action must be capable to being "timely adjudicated" in state court. See also, In re Howe, 913 F.2d 1138, 1142 (5th Cir. 1990) ("a district court must abstain from hearing a non-core, related matter if the action can be timely adjudicated in state court")

At bar, there can be no doubt that five of the six prerequisites are met: (1) plaintiff has made a timely motion (less than 30 days after removal); (2) the action is based on a state law claim; (4) the sole jurisdictional basis for the action is §1334; (5) the action was commenced in state court; and (6) the action may be timely adjudicated in state court. Thus, the only issue is whether (3) the action is "related to" but not "arising under the Bankruptcy Code" or "arising in a case under the Bankruptcy Code."

In determining whether the sixth prerequisite for abstention – that the case does not "arise from" a case under Title 11 -- the Court is required to determine whether the case is a "core proceeding" within the meaning of 28 U.S.C. §157(b). If the case is a "non-core proceeding," the Court must abstain. Mt. McKinley, supra, 399 F.3d at 447; Luan Investment S.E. v. Franklin 145 Corp., 304 F.3d 223, 232 (2nd Cir. 2002). 28 U.S.C. §157(b) contains a list (albeit non-exclusive) of types of actions deemed "core" proceedings. None of the categories referred to in that section encompasses a garden variety action for damages by the debtor or his trustee. All of the categories appear to relate to some aspect of the administration of the estate and are therefore integrally entwined in the Bankruptcy Court proceeding.

A core proceeding "must invoke a substantive right provided by Title 11." J.T. Moran Financial Corp. v. Phonetel Technologies Inc., 119 B.R. 447 (B. Ct. S.D.N.Y. 1990). In that case, the Bankruptcy Court held that:

> The debtor's state-law causes for indemnification and for breach of contract are not core matters because they do not invoke substantive rights provided by title 11 and are not central to the bankruptcy court's function in administering the estate of the debtor. A resolution of the debtor's state-law causes of action would affect the amount of property available for distribution to the creditors and should be classified as "otherwise" related to a case under title 11 within the meaning of 28 U.S.C. §157(c)(1). [Emphasis added].

(Id at 451). See also, Braniff International Airlines, Inc. v. Aeron Aviation Resources Holdings II, Inc., 159 B.R. 117 (E.D.N.Y.

1993); In re Private Capital Partners, Inc. v. RVI Guaranty Co., Inc., 139 B.R. 120 (B. Ct. S.D.N.Y. 1992). And, as the Court held in In re Emergency Beacon Corp., 52 B.R. 979 (S.D.N.Y. 1985):

> The term non-core proceeding is not specifically defined by the statute, but in view of the Supreme Court's decision in Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50m 73 L.Ed.3d 598, 102 S.Ct. 2858 (1982), non-core proceedings involve the "adjudication of state-created private rights, such as the right to recover contract damages..." and any matter "outside the core of federal bankruptcy power." Id at 71.

Here, the claims asserted by plaintiff do not invoke substantive rights created by the Bankruptcy Code but involve "adjudication of state-created private rights..." Indeed, they are not even claims of the bankruptcy estate. Plaintiff filed his bankruptcy case in 1997. In this malpractice action, he is complaining of conduct which is exclusively post-petition. According to the Complaint, defendant did not begin to represent plaintiff until the spring of 1999 (Complaint, ¶8). The malpractice complained of occurred in the spring of 2000 (Complaint, ¶17, et. seq.), and the damages claimed relate to lost salary beginning no earlier than 2002.

By statute, a bankruptcy estate consists solely of "interests of the debtor...as of the commencement of the case..." [11 U.S.C. §541(a)] (Emphasis added). With respect to causes of action belonging to the debtor, as the court noted in Bobroff v.

Continental Bank, 43 B.R. 746 (E.D. Pa. 1984), aff'd., 766 F.2d 797 (3rd Cir. 1985):

> Under the Bankruptcy Code, it is only those interests in property, including causes of action, that belong to the debtor at the time the petition in bankruptcy is filed that are considered 'property of the estate.' 11 U.S.C. §541(a)(1) (1982).

In Bobroff, the events which gave rise to the debtor's action for interference with contractual relations occurred following the filing of the debtor's petition under Chapter 7 of the Bankruptcy Code. Accordingly, the District Court held that those claims were not part of the bankruptcy estate. See, also, In Re Stamm, 222 F.3d 216 (5th Cir. 2000), in which the Court held that wages, earned after the filing of a petition, were not part of a Chapter 7 bankruptcy estate. A fortiori, here, where the claim is for lost wages which would have been earned years after the filing of the petition, the bankruptcy estate can have no claim to any proceeds earned in this action.

The defendant has filed a motion to dismiss the Complaint in which defendant claims that since there are factual allegations in the Complaint referring to a dispute over plaintiff's ownership of his shares of Britestarr, the claims belong to the estate. Defendants reason that since plaintiff's claim to the Britestarr shares are property of the bankruptcy estate, the case is related to plaintiff's bankruptcy case.

Even if defendant were correct, abstention would still be required. Section 1334(c)(2) presupposes that the Court has bankruptcy jurisdiction and that the case is related to the bankruptcy proceeding. The fact, however, that a recovery in the case would enrich the bankruptcy estate does not mean that the case "arose in" the bankruptcy proceeding within the meaning of §1334(c)(2).

In any event, contrary to defendant's assumption, plaintiff will not seek damages from defendant with respect to plaintiff's ownership of Britestarr shares. Rather, the damages sought by plaintiff in this case consist of his claim to lost salary and benefits resulting from defendant's advice to him that he resign as President of Britestarr. Plaintiff does not and will not allege that he was personally damaged as a result of the failure to settle the dispute concerning the Britestarr shares.

Thus, while plaintiff agrees with defendant that the Britestarr shares are the property of the bankruptcy estate, this case does not involve any such claim.

In summary, even if this case may be "related" to plaintiff's bankruptcy case, it did not "arise in" that case and accordingly, the Court is required to abstain from hearing the case under §1334(c)(2).

II.

IN ANY EVENT, THE COURT, IN ITS DISCRETION, SHOULD REMAND THIS CASE TO THE STATE COURT PURSUANT TO 28 U.S.C. §1452(b)

Even if the Court were to find that this malpractice action is a "core proceeding" within the meaning of the Bankruptcy Court, the Court would still have the authority to remand to state court pursuant to 28 U.S.C. §1452(b) and 28 U.S.C. §1334(c)(1). As shown below, the Court should exercise that discretion in favor of remand.

28 U.S.C. 1452(b) provides that:

> the Court to which [a state] claim or cause of action is removed may remand such claim or cause of action on any equitable ground...

28 U.S.C. §1334(c)(1) provides that:

> ...nothing in this section prevents a district court in the interests of justice or in the interest of comity with State Courts or respect for State Law from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

The analysis under both of the above sections is the same and has frequently been delineated by the courts, for example, in Buechner v. Avery, 2005 U.S. Dist. LEXIS 13735 (S.D.N.Y. 2005), at p. 15:

> In deciding whether to exercise discretion to abstain, among the factors considered are: (1) the

> effect on the efficient administration of the bankruptcy estate; (2) the extent to which issues of state law predominate; (3) the difficulty or unsettled nature of the applicable state law; (4) comity with state courts; (5) the degree of relatedness or remoteness of the proceeding with the main bankruptcy case; (6) the existence of a right to trial by jury; (7) prejudice to the involuntarily removed parties; and (8) the potential for duplicative and uneconomical use of judicial resources (Citations omitted).

These factors taken as a whole favor remand: First, as the Trustee, himself, appears to recognize, keeping the case in federal court will in no way improve the efficient administration of Mr. Norkin's bankruptcy estate, since the claims alleged in the petition are individual claims of Mr. Norkin. Indeed, adjudicating the claims in the bankruptcy proceeding would simply impose an additional burden on the trustee, including attorneys fees. Clearly, the bankruptcy trustee has expressed no interest in prosecuting the claims.

Second, the only legal issues in the action are New York State law issues. Plaintiff's bankruptcy case is in Connecticut. If the Court were to refer this case to the bankruptcy court, it would require a Connecticut federal court to find and apply New York substantive law, including New York disciplinary rules governing the conduct of New York lawyers.

Third, there may well be difficult issues of state law pertaining to whether defendant violated its ethical obligations to plaintiff, whether defendant represented plaintiff individually, and whether defendant's advice to plaintiff constituted malpractice and/or a breach of fiduciary duty.

Fourth, issues of comity favor a remand. As the Court noted in Buechner v. Avery, supra, at p. 18, "[t]he interests of comity are promoted by allowing the claims to remain where plaintiff elected to bring them, i.e., state court."

In this case, if the Court retains jurisdiction, defendant will undoubtedly seek to have the case transferred to the Bankruptcy Court in Connecticut. Thus, a federal court in another state will be called upon to resolve issues of a attorney's obligations to his client under the Disciplinary Rules and law of New York. Where transfer to another district is likely and where issues of significance to the transferor state predominate, comity favors abstention. As the Court noted in Kerusa Co., LLC v. W10Z/515 Real Estate Ltd. P'Shp., supra (2004 U.S. Dist. LEXIS 8168 at p. 18-19):

> In these cases, however, the removal from state to federal court does not simply move the matter to a courtroom across the street. As all parties agree, removal to this Court, if effected, is merely a stepping stone towards transfer of the cases to the federal court in North Carolina. The notion that a federal court in another region of

> the country, rather than a state court in New York County, should resolve disputes about a residential apartment building in New York City verges on the bizarre. The local significance of these cases argues strongly for returning the matter to the state courts.

Fifth, the issues in this case are remote from any issues in Mr. Norkin's bankruptcy case.

Sixth, and perhaps most important, in the state court, plaintiff would have a right to a jury trial. Pursuant to 8 U.S.C. §157(e), if this Court were to refer this matter to the bankruptcy judge, plaintiff would not be entitled to a jury trial unless defendant consented, and unless a special designation of jurisdiction is granted by the district court. As a practical matter, it is unlikely that defendant would consent to a jury trial if the case remained in federal court. Clearly, a district court should hesitate before accepting a case filed in state court where the action of removal will likely deprive plaintiff of his right to a jury trial. As the Court noted in Kerusa Co., LLC v. W10Z/515 Real Estate Limited Partnership, 43 Bankr. Ct. Dec. 22 (S.D.N.Y. 2004:

> Because a bankruptcy court cannot conduct a jury trial absent special designation by the district court and the consent of all parties, the presence of a Seventh Amendment jury trial right in a removed action weighs heavily in favor of remand (Citations omitted).

The seventh factor - "prejudice to the involuntarily removed parties" also favors plaintiff. Plaintiff, a New York resident, chose to bring this action in a New York state court. If this case is not remanded -- and especially if it is referred to the Bankruptcy Court in Connecticut -- plaintiff will be deprived of his choice of forum (See Buechner, supra, at p. 19).

In summary, even if the Court has jurisdiction under §1334, the Court should abstain from exercising that jurisdiction and should remand this matter to the state court.

Conclusion

This case should be remanded to the Supreme Court, New York County pursuant to 28 U.S.C. §1446 or, in the alternative, pursuant to §1452(b).

Dated: New York, New York
November 23, 2005

Respectfully submitted,

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